Supreme Court, U. S.
FILED
AUG 20 1979
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

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August, 1979

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BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of the jurisdictional statement filed on July 27, 1979 ("Jurisdictional Statement") by appellant Consolidated Edison Company of New York, Inc. ("Consolidated Edison") in the captioned appeal from a judgment of the Court of Appeals of the State of New York entered in this case on May 1, 1979. In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for both parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979), and is set forth in Appendix A to the Jurisdictional Statement at 1a-15a. The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978), and is set forth in Appendix B to the Jurisdictional Statement at 16a-23a. The opinion of Special Term, New York Supreme Court, Albany County, is reported at 93 Misc.2d 313, 402 N.Y.S.2d 551 (1978), and is set forth in Appendix C to the Jurisdictional Statement at 24a-28a. The opinion of the Public Service Commission of the State of New York ("the Commission") is reported at 17 NY PSC 1-R (1977), and is set forth in Appendix E to the Jurisdictional Statement at 31a-56a. The initial order of the Commission is not reported. It is set forth in Appendix F of the Jurisdictional Statement at 57a-58a. The order of the Commission on rehearing is reported at 17 NY PSC 17-R (1977), and is set forth in Appendix G of the Jurisdictional Statement at 59a-71a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2), the appeal drawing in question the validity of a statute of the State of New York as interpreted by the Court of Appeals of the State of New York, and the validity of an order of the Public Service Commission of the State of New York promulgated pursuant to such statute, on the ground of repugnancy to the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the decision below having been in favor of the validity of the statute as interpreted and in favor of the validity of the order.

Questions Presented

1. Whether Section 66 subd 12-a of the Public Service Law of the State of New York, interpreted (with the force of law) to apply to the regulation of the entire utility billing process, is constitutional as interpreted when invoked to limit appellant's expressional rights guaranteed by the First and Fourteenth Amendments.

2. Whether an order of the Public Service Commission of the State of New York (which order has the force of law in the State of New York) prohibiting the management of utilities under its jurisdiction from including material on "controversial matters of public policy" in envelopes used to render bills to customers violates appellant's expressional rights guaranteed by the First and Fourteenth Amendments.

Statutes Involved

Section 4, subd 1 and Section 66, subd 1 of the Public Service Law of the State of New York grants the Public Service Commission of the State of New York, among other things, "all powers necessary" to carry out the purposes of the Public Service Law and to "supervise" gas corporations and electric corporations.

Section 66, subd 12-a of the Public Service Law of the State of New York, which came into effect subsequent to the promulgation on February 25, 1977 of the Commission's order, in relevant part authorizes the Public Service Commission of the State of New York,

> ". . . to fix and alter the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric

corporations in levying charges for service, to assure simplicity and clarity . . .";

and provides that the Commission, among other things,

"shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy".

In the decision appealed from, the Court of Appeals of the State of New York interpreted the cited provisions and the quoted language as authorizing

"the Commission to regulate not only the format and informational content of the bill itself but of the entire billing communication" (Appendix A, p. 6a)

and as empowering

"the Commission to regulate the billing process as a whole" (Appendix A, p. 7a).

The Court of Appeals' interpretation of the Public Service Law of New York State has the force of law. Such interpretation was invoked by the Court of Appeals in upholding the validity of the February 25, 1977, Public Service Commission order involved here on the ground of the interest of government in protecting the privacy of its ratepayers. That interpretation is challenged as applied.

The Public Service Commission of the State of New York ordered, in relevant part, that

"[a]ll utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial issues of public policy" (Appendix F, p. 58a).

The text of the provisions of Public Service Law cited above and the text of the February 25, 1977 order are set out in full at page 1s to page 3s of the Jurisdictional Statement and at page 57a to page 58a of Appendix F.

Interest of Edison Electric Institute

Edison Electric Institute is the principal national association of electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and supply 77.1 percent of the nation's electricity. The decision of the Court of Appeals of the State of New York from which this appeal is taken concerns a vital interest of EEI and its members—their unhindered freedom to communicate their views.

Statement

The salient features of the decisions below are described in the Statement of the Case provided in appellant's Jurisdictional Statement at page 5 to page 9. That discussion need not be repeated here.

The constitutional questions raised by the order of the Public Service Commission of New York and the Public Service Law of New York State, as applied, have far-reaching implications for all of the nation's investor-owned utilities, especially those engaged in the provision of gas and electric service to retail customers. The unfettered freedom to communicate with their customers is of importance to these utilities at all times. That freedom has become more precious, and the importance of its preservation more acute, in recent years as questions of energy supply and distribution have moved from the periphery of the nation's immediate concerns to the very center of national attention.

As the importance of full public debate of energy-related questions has grown, however, the ability of the nation's utilities to participate in the debate through communications with their ratepayers has been constrained. In California as well as New York and, potentially, in North Carolina, Iowa and Maine as well, restrictions have been imposed on the traditional, and most cost-effective, means available to such utilities to communicate their views, i.e., by enclosing materials on issues of general public concern in envelopes containing bills for services rendered.

The decision of the Court of Appeals of New York appealed from should be reversed. No governmental interest is served by banning from appellant's billing envelopes expressions of its opinions on controversial issues. In the absence of such governmental interest, the First and Fourteenth Amendments protect the freedom of appellant—and others—to speak in such form and require that the Commission's order be invalidated.

ARGUMENT

Speech of the kind banned from appellant's monthly bills by the Commission's order, i.e., speech on public issues,*

* The Court of Appeals did not expressly characterize the type of speech involved in the Commission's ban. The Commission suggested below that the bill inserts constituted "commercial speech" see, e.g. Brief for Respondent Public Service Commission of the State of New York on Appeal to the Court of Appeals of the State of New York, pages 10 to 16. It suggested, by analogy to the decision of this Court in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) that appellant's use of bill inserts was entitled to somewhat lesser protection than "free speech" on public issues. There can be little question, however, that the subject of the banned communication, i.e., "controversial issues of public policy," is more like traditional speech on public issues than "commercial speech" on the prices of goods for sale.

is, of course, at the "heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776 (1978).

The ban constitutes a "significant impairment" of appellant's ability to communicate its views to others, an impairment of the sort that may not stand except upon demonstration, after "exacting scrutiny", of a paramount government interest of "vital importance" in the restriction, *Elrod* v. *Burns*, 427 U.S. 347 (1976), *First National City Bank of Boston, supra*, at 786.

A. The Court of Appeals Misconstrued the Context of Its Decision

The decision of the Court of Appeals upholding the Commission's order is based on the finding of a governmental interest in the privacy of a utility's ratepayers. The Court's finding is invalid since there is in fact no governmental interest in the restriction imposed by the Commission, see discussion below p. 11. The Court's erroneous finding on the privacy issue was predicated, moreover, on significantly erroneous characterizations of the appellant and of the restriction placed on appellant.

1. *The Court of Appeals erroneously suggests that utilities are second-class citizens.*

It is now settled that the fact that the source of the speech is a corporation does not diminish or alter the character of the protection afforded by the First and Fourteenth Amendments, *First National City Bank of Boston, supra*, at 777. Consolidated Edison, and other utilities similar to it, are no different from other corporations in this respect.*

* One of the anomalies of the Court of Appeals' decision is its finding of statutory authority for the Commission's ban in an expansive interpretation of recent amendments to Section 66 of the

The Commission's ban significantly impairs appellant's ability to communicate its views on public issues. First, it entirely deprives Consolidated Edison of a traditional commercial vehicle for stating its views, a vehicle available to all other types of business should they wish to communicate with their customers. Second, it imposes on Consolidated Edison the burden of separate mailings should it wish to express its views on public issues to customers, a burden which, to the extent it increases appellant's costs of doing business, will reduce the frequency and likelihood of such communications. Consolidated Edison, and other utilities similarly situated, alone among commercial enterprises are thus barred from utilizing a conventionally available method of communicating their views.

The Court of Appeals and the Commission sought to rationalize this discrimination against utilities in different ways, both invalid. The Court of Appeals referred to the fact that "consumers of utility service, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company" (Appendix

Public Service Law, amendments now embodied in subd. 12-a which did not come into effect until August 1, 1977, or six months after the date of the Commission's order (L. 1977, c. 527, Section 1).

The Court of Appeals interpreted the new amendments to authorize the Commission to regulate not only bills *per se* but the entire billing process—i.e., the contents of the envelope. Accepting as unreviewable the validity of that interpretation, the question remains of its validity as a matter of constitutional law when applied, in an *ex post facto* fashion, to constrict the traditional scope of appellant's exercise of expressional rights.

The Court of Appeals' *ex post facto* reliance on these amendments puts its decision on a different statutory basis from that relied upon by Special Term in invalidating the Commission's order and by the Appellate Division in reinstating that order. Both lower courts primarily regarded the order as an exercise (in the case of Special Term, as an invalid exercise) of the Commission's duty to allocate costs for political advertising to shareholder accounts.

A, p. 10a). Yet that argument proves too much. All credit customers are, in that sense, "captives" of a creditor, so the Court of Appeals' argument would justify a state's legislating against any creditor's inclusion in his monthly bill of any material on issues of public concern. The Commission, in contrast, sought to rationalize the discrimination against utilities on the somewhat different ground of the privilege of state-franchised monopoly enjoyed by the utility, a privilege which may concededly be regulated to assure its being exercised in the public interest (Appendix G, p. 67a). No government interest, however, justifies the manner in which that privilege was regulated here, see discussion below p. 11. Neither the rationalization provided by the Court of Appeals nor that provided by the Commission, therefore, justifies their relegation of utilities to second class citizenship.

2. *The Court of Appeals erroneously held that the Commission's ban is not content-based.*

A second threshold issue erroneously dealt with by the Court of Appeals was the nature of the restriction in question, which it found to be a regulation of the "time, manner and place of communication" rather than of its content (Appendix A, p. 9a), citing *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), *Cox* v. *New Hampshire,* 312 U.S. 569 (1941). It correctly stated that, to be valid, a restriction on the time, place and manner of communication must be content-neutral, supported by a significant government interest, and not foreclose alternative channels of expression (Appendix A, p. 9a), citing *Virginia Board of Pharmacy* v. *Virginia Consumer Council Inc.,* 425 U.S. 748, 771 (1976).

No governmental interest, much less a significant one, is involved here, see below, p. 11, so that the ban must be

invalidated even if the Court of Appeals were correct that the ban is merely a "time, place and manner" restriction. But the Court is not correct that the standards to be applied are those relating to restrictions on "time, manner and place".

The Commission's ban is not a "time, manner, and place" restriction because the ban selectively applies only to inserts on controversial issues, not to all inserts. It is not, therefore, "content-neutral." Content, in fact, provides the criterion of selection and of prohibition. That fact alone removes it from the category of "time, place and manner" restrictions as to which some latitude is allowed within the proscriptions of the First and Fourteenth Amendments. Its exclusion from that category *ipso facto* subjects it to the conventional, and more difficult, showing of a government interest of "vital importance", *Elrod, supra,* p. 7 enunciated by this Court for justifiable restrictions on speech on public issues.

A traditional indicium of content-based restriction is the proscription of speech of a prescribed content, e.g., advocacy of minority rights, etc. It is true that, as the Court of Appeals pointed out, the Commission's ban does not "extend . . . to all speech of a prescribed content," and that "no one [substantive] viewpoint is singled out for special treatment, nor is the general right to express ideas in other forums affected" (Appendix A, p. 9a). But that does not mean that this restriction is not content-based. In fact, it clearly resembles a content-based restriction more than it does any other type of restriction. The ban proscribes, in the forum most suitable and traditionally most often employed for the purpose, the expression (i) by appellant (ii) of a stated category of views. It does not, for instance, ban expression by appellant of the controversial views of others. Nor does it ban expression by appellant of non-controversial views. This version of a content-based restriction is no less abhorrent to the First Amendment than less camouflaged versions.*

B. No Governmental Interest is Served by the Ban

The Court of Appeal's erroneous characterization of the restriction is less significant, however, than its ultimate holding that a governmental interest in privacy warranted the restriction. This is because both categories—the content-based restriction and the content-neutral restriction—measure the validity of the restriction in terms of the governmental interest served thereby. A restriction which, as here, serves no governmental interest cannot stand.

Several "interests" were hypothesized at various stages of the proceedings below. None can withstand the "exacting scrutiny" mandated by this Court, least of all the interest in "privacy" lately championed by the Court of Appeals.

1. *No interest in mental or physical privacy is infringed.*

The Court of Appeals, perceiving an interest in "privacy" which both lower courts had failed to perceive, invoked a governmental interest in protecting "those who are inflamed by having a particular opinion foisted upon them". Remarkably, it equated the uninvited receipt of divergent opinion with the disinvited receipt of the "offensive communication" involved in *Rowan* v. *United States Post Office Department,* 397 U.S. 728, 737 (1970)** (Appen-

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* That the Commission's ban happens to apply only to mailing envelopes, the only mode of speech on controversial issues over which it has asserted jurisdiction, does not render it any less content-based.

** *Rowan* involved the constitutionality of a statute, 39 U.S.C. Section 4009, pursuant to which the Postmaster General might, on

dix A, p. 10a). It suggests, therefore, that the ban serves government interests in the protection against involuntary breach of a sort of "mental" privacy as well as a sort of "physical" privacy.

The privacy interests invoked by the Court of Appeals, while a legitimate government concern, are not in fact threatened in any meaningful way by the bill inserts. The Court of Appeals goes too far in speaking of the "foisting" by Consolidated Edison of its opinions on its ratepayers. Similarly it goes too far in maintaining that "[w]hatever materials are enclosed in the envelope are destined to come in contact with" the ratepayers with apparent analogy to the predicament of the bus rider forced to listen to radio advertisements during his ride (Appendix A, p. 10a). There is in fact no coercion to read Consolidated Edison's views when enclosed in a bill envelope. The ratepayer is entirely free not to read what he does not wish to read.

There is no invasion of physical privacy, either, in the receipt through the mailbox of Consolidated Edison's views. Those views are not themselves couched in offensive language and do not come within the restrictions permissible for such mail, see *Rowan, supra,* p. 11. Given that the language is unexceptionable and the mail not barred by the householder, the mailbox

> "is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mailbox to trash

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request of a person receiving such mail, order the sender of "pandering" material to stop sending it to such person. The continued receipt, after protest, of such mail, involved, as the Court recognized, an element of trespass against the household. *Rowan* is inapposite to the instant case since the Commission's ban operates without regard to ratepayer consent.

> can . . . is an acceptable burden" *Lamont* v. *Commissioner of Motor Vehicles,* 269 F. Supp. 880 (S.D.N.Y. 1967) per Frankel, U.S.D.J. (involving the practice of the Commissioner of Motor Vehicles of selling registrants' names and addresses to mail advertising concerns).

2. *The governmental interests originally defined by the Commission provide no basis for upholding the ban*

In its original decision and in its decision on petition for rehearing, the Commission adduced several reasons relating, in general, to considerations of fairness, why government should restrict utility access to ratepayers. These reasons (which the Court of Appeals did not adopt and therefore by fair implication rejected) have no more validity than the one it did adopt.

In its original decision, the Commission defended its ban on the ground it is "basically unfair" to ratepayers who disagree with Consolidated Edison to "subject" them to its views through the billing mechanism since that mechanism "should be used for the benefit of both the consumer and the company" (Appendix E, p. 43a). In its decision on petition for rehearing, the Commission recast its "fairness" argument in terms of fairness to the public. It contended that its ban was intended to eliminate "an unreasonable advantage . . . that unduly discriminates against others who . . . oppose the company's views" (Appendix G, p. 65a).* Neither formulation of the "fairness" argument is, on analysis, justifiable.

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* The Commission has considered, but rejected as unworkable, a proposal that would have permitted imposition of "something like a 'fairness' or 'equal time' requirement" on utilities (Appendix G, p. 66a) similar to the Federal Communication Commission's "fairness doctrine", *id.*

The premise for the Commission's finding of "unfairness" to ratepayers is its statement that bill inserts ought to "benefit" both the customer and the company. In so reasoning the Commission used familiar (to the Commission) categories of utility law. These categories, however, have no place in the resolution of First Amendment rights. The First Amendment is not conditioned on a showing of mutual benefit and contains no provisos that the mode of communication be a "two way" mode, or that the person addressed agrees or can "talk back". To allow the benefit analysis derived from the Public Service Law to limit utilities' First Amendment rights would lay a basis for limiting *all* public utility communications to what the several utility regulatory commissions consider to be mutually beneficial to the ratepayer and the utilities.

The Commission's finding of "unfairness" to the public, like its finding of unfairness to the ratepayers, is premised on borrowed concepts alien to First Amendment law. Invoking the logic of communications law, the Commission theorized that appellant should not publicize its views in a scarce "medium" to which opponents of those views lack access. It suggests that, like radio and TV, the bill envelope should be regulated by government to assure that those privileged with access act as "trustees of the public interest" (Appendix G, p. 66a). The fallacy of the Commission's reasoning is that the bill envelope is, if anything, an economically limited resource, i.e., not a resource which is "limited" in a manner which Constitutional law recognizes as justifying restrictions based on "fairness",* see, *e.g., Miami Herald Publishing Company* v. *Tornillo,* 418 U.S. 241 (1974) (newspapers may not be regulated to serve a public interest merely because economic considerations limit the number of newspapers published).

* Radio and television, of course, operate in a physically limited entity, the spectrum of available channels.

The two types of "unfairness" perceived by the Commission, in sum, involve alien categories of utility and communications law which, if followed, would soon leave First Amendment protections empty of substance. Those categories may find the public good in mutuality of benefit or equal access. But the First Amendment embodies an individual right not dependent on another's views or ability to react.

CONCLUSION

This Court should note probable jurisdiction in order to review the decision of the New York Court of Appeals sustaining the ban of the Commission on controversial bill inserts. That decision, with its far-reaching implications for the investor-owned utilities industry, should be reviewed as violative of the First Amendment rights of Consolidated Edison.

Respectfully submitted,

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